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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Mark Gregory Puhrmann,) No. CV-04-2902-PHX-MHM (JCG)
10 Petitioner,) **ORDER**
11 vs.)
12)
13 Dora B. Schriro, et al.,)
14 Respondents.)
15

16 Presently pending before this Court is Mark Gregory Puhrmann's ("Petitioner") petition
17 for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in which Petitioner challenges his
18 conviction in Maricopa County Superior Court (Doc. 1). Petitioner has filed the instant Writ
19 of Habeas Corpus claiming six grounds for relief. Respondents have filed an Answer and
20 assert that Petitioner's Writ of Habeas Corpus should be denied (Doc. 15). The matter was
21 referred to Magistrate Judge Jennifer C. Guerin, who issued a Report and Recommendation
22 recommending that the Court deny Petitioner's Writ of Habeas Corpus (Doc. 18). Petitioner
23 has not filed any objection to the Report and Recommendation.

24 **I. Standard of Review**

25 The district court must review the Magistrate Judge's findings and recommendations de
26 novo if objection is made but not otherwise. United States v. Reyna-Tapia, 328 F.3d 1114,
27 1121 (9th Cir. 2003)(en banc). See 28 U.S.C. § 636(b)(1)(C)("[a] judge of the court shall
28 make a de novo determination of those portions of the report or specified proposed findings

1 or recommendations to which objection is made"). "Failure to object to a magistrate judge's
2 recommendation waives all objections to the judge's findings of fact." Jones v. Wood, 207
3 F.3d 557, 562 n.2 (9th Cir. 2000).

4 **II. Discussion**

5 Petitioner claims six grounds of relief for habeas corpus review. Grounds One and Two
6 are denied on their merits. Grounds Three, Four, Five, and Six are barred because they are
7 procedurally defaulted due to a lack of exhaustion within the state system.

8 **A. Ground One**

9 In Ground One, Petitioner claims that his Eighth Amendment rights against cruel and
10 unusual punishment were violated when prison officials were deliberately indifferent to his
11 medical needs. In her Review and Recommendation, Judge Guerin noted that in order to
12 prevail on an intentional medical indifference claim, a petitioner must prove that prison
13 officials were purposely indifferent to the petitioner's medical needs. See Estelle v. Gamble,
14 429 U.S. 97, 104-05 (1976). An official is guilty of deliberate medical indifference only
15 when the official is aware of an inmate's medical problems but disregards those problems to
16 the detriment of the prisoner. Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002).
17 Petitioner fails to state allegations that suggest that the prison officials are culpable of
18 deliberate medical indifference. Petitioner has not established that his desired medical
19 treatment was necessary to maintain his well-being or that denial of the treatment resulted
20 in the demise of his health.

21 **B. Ground Two**

22 In Ground Two, Petitioner alleges that his trial counsel was ineffective for failing to
23 request a Rule 11 hearing to determine Petitioner's competency prior to sentencing.
24 Petitioner has not established a claim because he has not demonstrated that (1) counsel's
25 representation fell below the reasonable standard, and (2) the outcome of the proceeding
26 would most likely have been different if counsel had not erred. See Strickland v.
27 Washington, 466 U.S. 668, 688, 694 (1984). Furthermore, counsel's "failure to make a futile
28 motion does not constitute ineffective assistance." James v. Borg, 24 F.3d 20, 27 (9th Cir.

1 1994). The facts of the record indicate that a motion for a Rule 11 hearing would have been
2 in vain. As such, habeas relief on the merits of Ground Two is denied.

3 **C. Grounds Three and Four**

4 A petitioner must exhaust his claims by having the state's highest court review them, either
5 by way of direct appeal or collateral proceedings, before a federal court is allowed to
6 consider a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. See Rose v. Lundy, 455
7 U.S. 509, 519 (1982). It is also required that a petitioner have presented his claim to the state
8 court in a procedural context so that the merits of the claim will be taken into account. See
9 Castille v. Peoples, 489 U.S. 345, 351 (1989). Petitioner alleged in Ground Three that the
10 trial court abused its discretion in failing to order a Rule 11 competency hearing and also
11 alleged, in Ground Four, that the trial court abused its discretion by changing the length of
12 Petitioner's sentence. However, as stated by Magistrate Judge Guerin, Petitioner did not
13 bring the constitutional claims of Grounds Three and Four to the attention of the state courts.
14 Therefore, these two Grounds are procedurally barred.

15 **D. Grounds Five and Six**

16 Likewise, Petitioner did not raise Ground Five, an alleged violation of the Double
17 Jeopardy Clause, during his state court proceedings. As such Petitioner is precluded from
18 raising the issue for the first time in his habeas petition. Additionally, Petitioner did not raise
19 Ground Six, that Best Buy conducted an illegal search and seizure of his laptop, in his Court
20 of Appeals petition for review. Ground Six is, thus, not exhausted.

21 **E. Preclusion**

22 Petitioner is now precluded under Arizona law from attaining relief on Grounds Three,
23 Four, Five and Six without a valid exception. See Ariz. R. Crim. P. 32.2(a)(3); 32.4.
24 Petitioner does not assert any exceptions. Accordingly, the Court will adopt Judge Guerin's
25 recommendation that Grounds Three, Four, Five, and Six be dismissed as procedurally
26 barred.

27 **Accordingly,**
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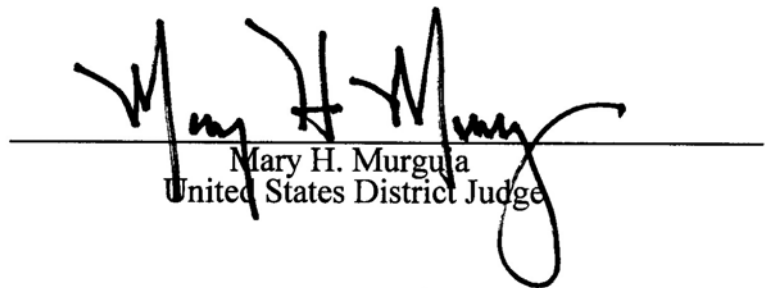
1 **IT IS HEREBY ORDERED** that the Court adopts Magistrate Judge Guerin's Report and
2 Recommendation in its entirety as the Order of the Court (Doc. 18).

3 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus pursuant to
4 28 U.S.C. § 2254 is denied (Doc. 1).

5 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment
6 accordingly.

7 DATED this 18th day of June, 2007.

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Mary H. Murgula
United States District Judge